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No. 03-245

# In the Supreme Court of the United States

DALE R. DEROLPH, ET AL.,
*Petitioners*,

v.

THE STATE EX REL.
STATE OF OHIO,
*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

## BRIEF OF AMICI CURIAE
## The Honorable Ted Strickland, Sherrod Brown, Tim Ryan, Stephanie Tubbs Jones, Marcy Kaptur, Dennis Kucinich, and Chaka Fattah, Members of Congress, in Support of Petitioners

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## INTEREST OF AMICI CURIAE

As elected federal representatives of students and families in Ohio and Pennsylvania who suffer from inadequate educational opportunities due to inequitable school funding, U.S. Representatives Ted Strickland, Sherrod Brown, Tim Ryan, Stephanie Tubbs Jones, Marcy Kaptur, Dennis Kucinich and Chaka Fattah have a real and substantial interest in the issues raised in this petition.[1] This brief illustrates not only the legal necessity of U.S. Supreme Court review of Ohio's recent school funding decision, but also provides pertinent information on the fiscal challenges faced by schools in districts represented by these Members of Congress.

Members of Congress have long recognized the need to level the educational playing field as illustrated by passage of the Elementary and Secondary Education Act of 1965, which established the Title I, Part A, non-discretionary program with the purpose ensuring that all children have a "fair, equal and significant opportunity to obtain high-quality education...." 20 U.S.C. § 6301 (2003). The Act seeks to achieve this purpose in part by closing the achievement gap between "disadvantaged children and their more advantaged peers." *Id.* This is the largest federal elementary and secondary education assistance program in existence.

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from all parties regarding the filing of this brief have been filed with the Clerk. In accordance with this Court's Rule 37.6, amici curiae represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the amici curiae, its members, or its counsel made monetary contributions to the preparation or submission of this brief.

Sadly, the problems confronting disadvantaged school districts and students at the local level are being exacerbated by new federal requirements mandated under the No Child Left Behind Act of 2001. Pub. L. No. 107-110. These new requirements have been imposed on local school districts, but not adequately funded by the federal government. These new federal mandates, combined with current funding inequities, will ironically leave disadvantaged students farther and farther behind.

Amici Curiae enter this appearance on behalf of the petitioners, public school students, parents, teachers, school boards and school administrators in their congressional districts.

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Amici Curiae file this pleading to inform the Court of the severe impacts on children, their families and society as a whole of the underfunding of economically poorer Ohio school districts and the importance to the Rule of Law that judicial orders be enforced. The underlying determination that the Ohio funding mechanism violates the Ohio State Constitution has been determined and is not at issue, but the Ohio Supreme Court has ordered that the lower state courts take no actions to enforce these determinations, turning adjudications of unconstitutionality into advisory pronouncements. Although it is not to be denied that *some* remedies for law violations may be found inequitable, ill advised or even beyond the powers of a court, for an appellate court to deny the *possibility* of *any* remedy for a wrong *in advance of consideration of possible lower court rulings on remedy*, sanctions and ensures the non-enforceability of constitutional (and other) legal requirements. This is a matter that warrants this Court's review.

## STATEMENT OF THE CASE

After nearly a decade of litigation in which the Ohio Supreme Court has repeatedly declared the current public school funding system in Ohio unconstitutional,[2] the Ohio Court on May 16, 2003, issued a writ of prohibition effectively barring any remedy for the 1.8 million school children in Ohio, who are irreparably harmed by this unjust and inadequate system.[3] *State ex rel. State of Ohio v. Lewis*, 99 Ohio St.3d 97, 789 N.E.2d 195 (2003).

In July of 1994, Perry County Common Pleas Judge Linton Lewis first held, in an unreported decision, that Ohio's school funding system, which primarily relies on property taxes, violated § 2, Article VI of the Ohio Constitution. The Ohio Supreme Court ultimately upheld the trial court's decision on March 24, 1997. *DeRolph v. State*, 78 Ohio St.3d 193, 677 N.E.2d 733 (1997) (*DeRolph I*). In

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[2] *DeRolph v. State*, 78 Ohio St.3d 193, 677 N.E.2d 733 (1997) (*DeRolph I*) (declaring public school funding in Ohio unconstitutional and ordering injunctive relief); *DeRolph v. State*, 89 Ohio St.3d 1, 728 N.E.2d 993 (2000) (*DeRolph II*) (determining that the State remained in violation and reiterating order that the State undertake a complete systematic school funding overhaul); *DeRolph v. State*, 93 Ohio St. 3d 309, 754 N.E.2d 1184 (2001) (*DeRolph III*) (ordering specific changes to the State's school funding formula); *DeRolph v. State*, 93 Ohio St.3d 628, 758 N.E.2d 1113 (2001) (ordering mediation); *DeRolph v. State*, 97 Ohio St.3d 434, 780 N.E.2d 529 (2002) (*DeRolph IV*) (reiterating for the fourth time that the school funding system is unconstitutional).

[3] *See* The Ohio Department of Education (visited Sept. 11, 2003) <http://www.ode.state.oh.us/data/Fall_enroll_blgd_grade/BLDG_2003.XLS> for data on school enrollment in Ohio.

*DeRolph I*, the Ohio Supreme Court determined that the plaintiffs' schools were "starved for funds, lacked teachers, buildings, and equipment, and had inferior educational programs, and that their pupils were being deprived of educational opportunity." *Id.* at 205, 677 N.E.2d at 742. As the majority opinion of the Ohio State Supreme Court in *DeRolph I* stated, "By our decision today, we send a clear message to lawmakers: the time has come to fix the system. Let there be no misunderstanding. Ohio's public school financing scheme must undergo a complete systematic overhaul." *DeRolph I* at 212, 677 N.E.2d at 747. After the trial court concluded that the State had failed to comply with the requirements of *DeRolph I, DeRolph v. State*, 98 Ohio Misc.2d 1, 712 N.E.2d 125 (1999), the State again appealed to the Ohio Supreme Court. *DeRolph v. State*, 89 Ohio St.3d 1, 728 N.E.2d 993 (2000) (*DeRolph II*). In determining that the State had not met its *DeRolph I* mandate, the Ohio Court reiterated its directive that the legislature provide a complete systematic overhaul of the school funding system in *DeRolph II*. *Id.* The following year, the Court again held the school funding system unconstitutional in a decision which set forth specific changes necessary to bring the system into compliance with prior Court decisions. *DeRolph v. Ohio,* 93 Ohio St.3d 309, 754 N.E.2d 1184, 1201 (2001) (*DeRolph III*). When the State responded by seeking reconsideration of the *DeRolph III* decision, instead of ordering the specific changes suggested, the Ohio Supreme Court ordered mediation. *DeRolph v. Ohio*, 93 Ohio St.3d 628, 758 N.E.2d 1113 (2001). Mediation failed, and the Court again declared Ohio's school funding system unconstitutional, directing the General Assembly to "enact a school-funding scheme that is thorough and efficient as explained in *DeRolph I, DeRolph II*, and the accompanying concurrences." *DeRolph v. State*, 97 Ohio St.3d 434, 435, 780 N.E.2d 529, 530 (2002) (*DeRolph IV*).

Therefore, in four separate decisions, the Ohio Supreme Court declared the Ohio school funding system unconstitutional and directed the State to take action. For more than six years, the State has brazenly refused to comply. In the face of such refusal, the Ohio Supreme Court in *Lewis*, eliminated any hope of redress for the Ohio school children who have fallen victim to the State's belligerence.

## REASONS FOR GRANTING THE WRIT

### I. The Ohio Court's ruling in *Lewis* denies Ohio's school children a recognized and enforceable right in violation of Due Process and Equal Protection of the law.

State court denials of due process rights are remedial in federal courts. *Powell v. Alabama*, 287 U.S. 45 (1932). Access to the state judicial process is a constitutionally recognized right invoking the Due Process Clause of the Fourteenth Amendment. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). The right to access is dependent on importance of the subject before the court. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). The critical importance of education has been recognized in numerous rulings by this Court. *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003); *Plyer v. Doe*, 457 U.S. 202 (1982), *Goss v. Lopez*, 419 U.S. 565 (1975), *Brown v. Bd. of Educ.*, 347 U.S. 483, (1954).

The State of Ohio's failure to change Ohio's flawed school funding system and the Supreme Court's subsequent writ of prohibition in *Lewis* barring any remedy, denies Due Process to the 1.8 million children who currently attend public schools in Ohio. The cost to the quality of education in Ohio is immeasurable. Currently, whether an investment is made in a child is determined solely on the basis of where he or she

lives and, more specifically, whether his or her school district has a strong or a weak property tax base. As the Ohio Supreme Court has held multiple times,[4] this system is patently unfair and does not serve the state's best interest.

The Court's dismissal came at a time when many schools and children in Ohio are suffering the consequences of inadequate funding. Nine school districts are in Fiscal Watch/Emergency and fourteen districts are in Fiscal Caution.[5] There have been 2,037 tax levies placed on Ohio ballots in the last five years.[6] Why must we continue on the path of fighting year-to-year and levy-to-levy to fund our schools? The reason is simple: although minor changes have been made by the legislature,[7] there has not been a complete

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[4] Supra, note 4.

[5] *See* The State of Ohio Auditor (visited Sept. 11, 2003) <http://www.auditor.state.oh.us/fiscal_watch_emergency/schools_in_fiscal_watch_emergency.pdf> for a list of schools in Fiscal Watch/Emergency; The State of Ohio Auditor (visited Sept. 11, 2003) <http://www.ode.state.oh.us/school_finance/finance_and_mgmt_svcs/fiscal_accountability/fiscal_caution_districts.asp> for a list of schools in Fiscal Caution.

[6] *See* The Ohio Department of Education's School Finance, Finance and Management Services, Election Results data (visited Sept. 11, 2003) <http://www.ode.state.oh.us/school_finance/finance_and_mgmt_svcs/election_results/Aug_2003_election_summary.asp> for levies that have been placed on Ohio ballots in the last five years. As the Ohio Supreme Court stated in *DeRolph II*, "Requiring school districts to seek additional tax increases to make up for lost revenue is something that should be avoided, especially in view of our holding in *DeRolph I*, which required overreliance on local property taxes to be eliminated." *DeRolph* at 31, 728 N.E. 2d at 1016.

[7] *See* The Ohio Department of Education's report about Ohio's School Foundation Funding Program (visited Sept. 12, 2003) <http://www.ode.state.oh.us/school_finance/PDF/2004_SF-

systematic overhaul of Ohio's public school financing scheme as previously ordered by the Ohio Supreme Court.

An examination of pertinent statistics makes it plain that Ohio's school funding system, still based primarily on local property taxes,[8] is shortchanging many children living in poverty-stricken areas. By cross-referencing the list of 2001 tax returns by school district with the 2002 state report card ratings of Ohio school districts, [9] it is obvious that poorer school districts are at a distinct and unfair disadvantage. The state of Ohio assigns each school district a report card rating based on twenty-two criteria. [10] Among the school districts whose adjusted gross income ranked in the top forty,[11] thirty-five received ratings of excellent.[12] The remaining five

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3_LINEBYLINE.pdf> for a description of the changes made to the state's funding system by the Ohio General Assembly.

[8] 48.39% of school revenue comes from local property taxes, 45.73% is provided by the State, and 5.88% comes from the federal government. Ohio Department of Education, Office of Policy and Research Analysis, Simulation Unit.

[9] *See* The Ohio Department of Taxation's Tax Data Series (visited Sept. 11, 2003) <http://www.state.oh.us/tax/ftp/y2cy01.pdf> for income tax data by school district.

[10] These criteria include the school district's overall performance in subjects on the 4th, 6th and 9th grade proficiency tests, the district's attendance rate, and the district's graduation rate. Districts that meet 21-22 criteria receive a rating of excellent, those which meet 17-20 receive an effective rating, those meeting 11-16 are given a rating of continuous improvement, those meeting 7-10 standards are place on academic watch, and those meeting 6 or fewer criteria are classified as academic emergency.

[11] *See* The Ohio Department of Taxation's Tax Data Series (visited July 16, 2003) <http://www.state.oh.us/tax/ftp/y2cy01.pdf> for income tax data by school district.

[12] *See* The Ohio Department of Education's compilation of District Level Performance Indicators (visited July 28, 2003)

districts in the top thirty received effective ratings.[13] The numbers for the forty school districts at the other end of the spectrum, fifteen of which are in Congressman Strickland's district,[14] are quite different. Only one school district received an excellent rating, and only six received effective ratings.[15] Twenty-one school districts received ratings of continuous improvement.[16] Unfortunately, three of these districts received ratings of academic watch,[17] and nine of the forty school districts from the bottom forty income levels received the very lowest possible rating, academic emergency.[18] Additionally, of the nine school districts

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<http://webapp1.ode.state.oh.us/district_rating/> for state school district report card ratings.

[13] *See* The Ohio Department of Taxation's Tax Data Series (visited July 16, 2003) <http://www.state.oh.us/tax/ftp/y2cy01.pdf> for income tax data by school district; *See* The Ohio Department of Education's compilation of District Level Performance Indicators (visited July 28, 2003) <http://webapp1.ode.state.oh.us/district_rating/> for state school district report card ratings.

[14] Schools districts whose adjusted gross income falls in the bottom 40 in the state and which are in Congressman Strickland's office are: Barnesville Exempted Village, Bellaire City, Bridgeport Exempted Village, Caldwell Exempted Village, Dawson-Bryant Local, East Liverpool City, Ironton City, Martins Ferry City, Meigs Local, Rock Hill Local, Steubenville City, Symmes Valley Local, Trimble Local, Union Local and Wellsville Local.

[15] *See* The Ohio Department of Education's compilation of District Level Performance Indicators (visited July 28, 2003) <http://webapp1.ode.state.oh.us/district_rating/> for state school district report card ratings.

[16] *Id.*

[17] *Id.*

[18] *See* The Ohio Department of Taxation's Tax Data Series (visited July 16, 2003) <http://www.state.oh.us/tax/ftp/y2cy01.pdf> for income tax data by school district; *See* The Ohio Department of

currently in Fiscal Watch/Emergency in Ohio, three are located within the boundaries of the 17th Congressional District represented by Congressman Tim Ryan.[19] In order to receive fiscal relief through a "Fiscal Watch/Emergency" designation, school districts are required by law to petition their electorate.[20] Unfortunately, the nine school districts were unsuccessful in their attempts.

The juxtaposition between wealthy and poor school districts is also evident in Ohio's 11th Congressional District, located in eastern Cuyahoga County and represented by Congresswoman Stephanie Tubbs Jones. In 2001, the Mean Ohio Adjusted Gross Income within the Orange City School District was $55,305, ranking fifth in the state.[21] During the 2003 fiscal year, the district received an excellent rating and met twenty-two of the performance standards set by the

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Education's compilation of District Level Performance Indicators (visited July 28, 2003) <http://webapp1.ode.state.oh.us/district_rating/> for state school district report card ratings.

[19] School districts located in Congressman Tim Ryan's Congressional District that have received a rating of Fiscal Watch/Emergency are Lordstown Local, Massillon City, and Niles City.

[20] *See* The Ohio Department of Education's Summary of Requirements for Fiscal Watch after S.B. 345, effective 4/10/01 (visited Sept. 11, 2003) <http://www.ode.state.oh.us/school_finance/finance_and_mgmt_svcs/fiscal_accountability/Fiscal_Watch.pdf> and The Ohio Department of Education's Summary of Requirements for Fiscal Emergency after S.B. 345, effective 4/10/01 (visited Sept. 11, 2003) <http://www.ode.state.oh.us/school_finance/finance_and_mgmt_svcs/fiscal_accountability/Fiscal_Emergency.pdf> for definitions.

[21] *See* The Ohio Department of Taxation's Tax Data Series (visited September 3, 2003) <http://www.state.oh.us/tax/ftp/y2cy01.pdf> for income tax data by school district.

school district.[22] Moreover, the Orange City School District met its Adequate Yearly Progress goals for 2002-2003 and had a Student Graduation Rate of 97.4% for the same year.[23] Comparatively, just nine miles away from Orange City, the East Cleveland City School District reported a Mean Ohio Adjusted Gross Income of $20,031 in 2001, ranking 610th in the state.[24] The district received a rating of Academic Emergency for the 2002-2003 school year and only met six of the performance standards set by the school district.[25] The East Cleveland City School District did not meet its Adequate Yearly Progress goals for that year, and the district's graduation rate was only 52.9%.[26]

There is no doubt that students from wealthier school districts, defined as having strong property tax bases, have a significant educational advantage over those from poverty-stricken areas. This impacts many schools districts all over the state. For example, Congressman Strickland's district includes many school districts in Appalachia, one of the state's and the country's poorest regions.[27] In school districts

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[22] *See* The Ohio Department of Education's compilation of District Level Performance Indicators (visited Sept. 3, 2003) <http://webapp1.ode.state.oh.us/district_rating/> for state school district report card ratings.

[23] *Id.*

[24] *See* The Ohio Department of Taxation's Tax Data Series (visited Sept. 3, 2003) <http://www.state.oh.us/tax/ftp/y2cy01.pdf> for income tax data by school district.

[25] *See* The Ohio Department of Education's compilation of District Level Performance Indicators (visited Sept. 3, 2003) <http://webapp1.ode.state.oh.us/district_rating/> for state school district report card ratings.

[26] *Id.*

[27] According to the Appalachian Regional Commission, Appalachia includes all of West Virginia and parts of Alabama, Georgia,

in Belmont County, for example, the average expenditure per pupil is $6,928.[28] In other, wealthier areas, school districts are able put more money into each student's education, thereby providing those students with a more complete educational experience. In Cuyahoga County, which includes many of Cleveland's wealthy suburbs, average expenditure for each [or per] student in fiscal year 2002 was $10,203.[29] Among individual school districts, the contrast is even more glaring. While expenditure per pupil in Belmont County's Shadyside Local School district is $6,053, expenditure per pupil in Beachwood City School District in Cuyahoga County is $16,425.[30] Such vast disparities are unnerving but must be acknowledged because they illustrate the disastrous effects of Ohio's flawed school funding system.

Inequitable school funding is not only an Ohio problem. In Pennsylvania, the state with the fourth highest per pupil gap, Lower Marion School District spends $12,677 per student in comparison with Philadelphia City School District in Congressman Chaka Fattah's Congressional District, which spends $7,768 per student. This gap amounts to $122,725 less per year for a Philadelphia classroom of 25 students.

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Kentucky, Maryland, Mississippi, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, and Virginia. *See* The U.S. Census Bureau's 2000 Census Data, Population by Poverty Status in 1999 for Counties (visited Sept. 11, 2003) <http://www.census.gov/hhes/poverty/2000census/poppvstat00.html> for the percentage of residents living in poverty by county.

[28] Ohio Department of Education. Office of Policy and Research Analysis, Simulation Unit.

[29] *Id.*

[30] Ohio Department of Education. Office of Policy and Research Analysis, Simulation Unit.

These graphic disparities are illustrative of the injustice suffered by those children who are not fortunate enough to live in a wealthy school district. Children from the highest 40 income levels of Ohio schools have a 0% chance of going to a school that is on academic emergency, academic watch or continuous improvement. But children from the 40 lowest income districts are most likely to go to a school with a "continuous improvement" rating, signifying that those districts are still working toward even becoming effective. These children have a whopping 22.5% chance of going to an academic emergency school. This inequality is even more disturbing when one considers that the state of Ohio has been directed repeatedly to remedy the problem.

It is unrealistic to propose that Ohio's educational system will ever provide the exact same opportunities for each child from school district to school district. While such an idyllic system is desirable, it would be nearly impossible to achieve. This is not what the plaintiffs ask for or expect. What they do demand is that the state of Ohio complies with the requirements set before it in the Ohio Constitution, as interpreted by the State's Supreme Court. Whether the funding system is constitutional is not in question -- the Supreme Court has said that the funding system is definitively not constitutional. The harm to Ohio children is real, and the implications of allowing the State to brazenly stand behind and refuse to change an unconstitutional law are momentous. It is exceedingly reasonable for the plaintiffs to seek enforcement of the Ohio Court's repeated pronouncement on Ohio's school funding system.

The Ohio Supreme Court's decision to grant the state's writ of prohibition preventing the trial judge from enforcing the Supreme Court's ruling against the state has wide-reaching implications. What this means for many Ohio school children

is that they will continue to go to school and be forced to share books. They will continue to go to school and eat lunch at their desks. They will continue to attend schools that are entirely modular and be forced to take a bus to another location for gym class. They will continue to use boiler rooms as classrooms for music and art, that is, if they are among the lucky children whose schools have been able to retain music and art programs at all. The message will be clear: even though the Ohio constitution gives every Ohio child a right to a thorough and efficient system of education, Ohio Const. art. VI § 2, children from poor districts are deemed unworthy of such constitutional protection. These children will have to take what they can get, and make do with what little they have. This is not the message we may send to our children consonant with the legal requirements that the Ohio Supreme Court has enunciated.

The superficial changes that the state has undertaken in the school funding system have helped many school districts. Schools whose buildings were dilapidated and falling apart have been able to raise the funds to build new schools. For example, Fairland High School in Lawrence County is brand new today because the school was able to use over $30 million in state funds[31] to build a school with great facilities and resources. To the extent that the states' redirected and/or increased funds have reached certain disadvantaged school districts like Fairland, those funds have been infinitely helpful. But this temporary stream of funding does not address the serious systemic problem that has been repeatedly

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[31] *See* The Ohio School Facilities Commission, Program Amounts by School District, Fairland Local School District (visited Sept. 11, 2003) <http://www.osfc.state.oh.us/programtotals99.ASP?%5BEnterIRN%5D=47936#> for state and local Classroom Facilities Assistance Money used by Fairland Local School District.

condemned by the Ohio Supreme Court. Without a holistic, systemic approach to school funding reform, schools without a strong property tax base will be facing the same inadequate and inequitable funding problems in 20 years. The only way to avoid that scenario, and avoid another series of long and costly cases like *DeRolph*, is for this Court to require Ohio to comply with the Ohio Supreme Court's mandate.

Accordingly, this Court should grant this petition for writ of certiorari to enforce the Due Process rights of the most vulnerable citizens of Ohio, our children.

## II. The Ohio Supreme Court's elimination of plaintiffs' remedy cannot stand in light of our Nation's established state/federal system of justice and the far reaching consequences it may have on the many other states involved in similar litigation.

This Court, while deferential, has not hesitated to exercise jurisdiction in even the most heated and weighty of political issues when faced with a question of the constitutionality of an action by a state court. *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam); *See NAACP v. Ala. ex rel. Patterson,* 357 U.S. 449 (1958); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Madsen v. Women's Health Center*, 512 U.S. 753 (1994); *Mitchum v. Foster*, 407 U.S. 225 (1972). *See also*, *Colo. v. Evans*, 517 U.S. 620 (1995).

If the Supreme Court chooses not to hear this case, it will be a signal to other states that judicial pronouncements do not have to be enforced. This is especially true in light of the many states which are involved in litigation similar to *DeRolph*. It will signal to those states whose constitutions require a thorough and efficient system, or something

comparable, that the state legislature does not have to comply or that the state's highest courts can arbitrarily espouse constitutional rights without worry of what means will enforce those rights.

Every state constitution has some provision regarding education, several of which are similar to the Ohio Constitution's provision. The terms most often found in state constitutions include "general and uniform," "thorough and efficient," or some combination or variation of the two.[32] Other significant language includes calling for an "adequate" system of public schools,[33] a system of "high quality" schools,[34] and a system of "free, quality" public schools.[35] All of these terms are open to some interpretation. As a state's highest judicial authority, it is the job of the state Supreme Court to determine the meaning of each state's constitution. If the Ohio General Assembly is permitted to ignore the ruling of the Ohio Supreme Court and no further action is taken or enforced, other state assemblies will take notice. They will know that, even if the school funding system that they put in place does not allow state educational facilities to meet the requirements of each state constitution, there will be no body to enforce the state's constitution. For hundreds of years, the legislative bodies in this nation have

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[32] The states whose Constitutions require either "general and uniform" and/or "thorough and efficient" include Arizona, Arkansas, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Kentucky, Maryland, Minnesota, Mississippi, Nevada, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Texas, Utah, Washington, West Virginia and Wyoming. 65 Temp. L. Rev. 1325, 1347.

[33] Georgia Const., art. VIII, , § 1.

[34] Illinois Const., art. X, , § 1; Virginia Const., art. VIII, , § 1.

[35] Montana Const., art. X, § 1 (3).

respected the decisions on the constitutionality of laws and have acted accordingly.[36]

The legislature's failure to comply with Ohio's constitutional mandate is inexcusable. While time was at first a consideration, nearly a decade has passed since the school funding system was first held unconstitutional by the trial court. Yet the system remains largely unchanged. Ohio still relies primarily on property taxes to fund its schools, a practice that was explicitly denounced in every *DeRolph* decision.[37] Time is no longer an excuse for the state of Ohio to refuse to create a constitutional school funding system.

Furthermore, the current economic climate does not excuse the General Assembly from making systemic alterations to the school funding system. While the current economic downturn may make it difficult for the State to pursue other methods of funding, the State did not act in favorable economic times. This system should not be tolerated on the premise that the state will come up with something better when the economy recovers. Budgetary concerns aside, the state cannot continue to operate under laws that are unconstitutional simply because the public

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[36] "We have 200-plus years of history on our side that when a court says things are unconstitutional, the legislature accepts that and puts together a good-faith effort to deal with the (ruling) of the high court, whether it's state or federal." Ohio Supreme Court Justice Paul Pfeifer, as quoted in the *Columbus Dispatch*. Darrell Rowland. "Ohio's School Funding Crisis: What Now?" *Columbus Dispatch*, December 12, 2002, 01A.

[37] *DeRolph I* at 213, 677 N.E. 2d at 744; *DeRolph II* at 37, 728 N.E.2d at 1020; *DeRolph III* at 322, 754 N.E.2d at 1198; *DeRolph IV* at 436, 780 N.E.2d at 530.

coffers are not overflowing.[38] If we tolerate financial hardship as an excuse for leaving unconstitutional programs in place, what will be next? Should we put a tax on voting? Sell the right to free speech? Should we feed state prisoners one meal a day instead of three? Here it may seem easy to look the other way because the victims of this political inaction are children whose political voices are soft. If this violated some other right under the U.S. or Ohio Constitution -- if, for instance, it were a law saying that indigent accused criminals no longer had a right to an attorney -- one can be certain the outcry would be great. Why is the outcry not just as great when it is the education of our children that is imperiled? The right to a thorough and effective system of government granted in the Ohio Constitution bears just as much significance as other constitutional rights. The State can no more fail to provide a constitutional system of education than it can suspend criminal due process or refuse to feed prisoners.

As petitioners rightfully state in their brief, segregation would still exist today if no judicial remedy was provided in *Brown*. (Pet. 27) It is antithetical to the ideals and principles of our society to recognize a constitutional right, but to deny a remedy to secure that right. By refusing to allow the trial judge to enforce its own ruling, the Ohio Supreme Court has gravely undermined the system by taking away the built-in check on the legislature.

When the Ohio Supreme Court rendered its first *DeRolph* opinion, it concluded with the following remarks:

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[38] *See DeRolph v. State*, 97 Ohio St.3d 434, 436, 780 N.E. 2d 529, 530 (2002). ("We are not unmindful of the difficulties facing the state, but those difficulties do not trump the constitution.")

> School funding has been, and continues to be, a Herculean task. As thirty-seven lawmakers concede in their *amicus curiae* brief, despite their recent efforts, the General Assembly has not funded our public schools properly. They assert that unless this court rules in favor of the appellants, the urgency of resolving public school funding will quickly fade. We find that this brief eloquently expresses the helplessness felt even by many of our state legislators.

*DeRolph I* at 211-212, 677 N.E.2d at 746.

It is with the same earnestness that these thirty-seven lawmakers came to the Ohio Supreme Court eight years ago that we come to the U.S. Supreme Court today. Disallowing Judge Lewis to enforce the higher court's ruling will only lead to the erosion of both our judicial system and our education system. We cannot turn our backs on the problem at hand; we must allow the judicial system to guide our actions that protect all children, regardless of where they live or the wealth of their community.

Accordingly, this Court should grant the petition for writ of certiorari to ensure that school children in Ohio, and throughout the nation, are guaranteed that legally enforceable rights will not be hollow, but will be accompanied by legally enforceable remedies. This is the essence of the Rule of Law.

## CONCLUSION

For all the aforementioned reasons, as well as the reasons articulated by petitioner, certiorari should be granted.

Respectfully Submitted,

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